

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDRES HERNANDEZ VARGAS,

Petitioner,

v.

UNITED STATES OF AMERICA ,

Respondent.

CASE NO. C11-5957 RBL

ORDER

THIS MATTER is before the Court on Petitioner's Motion for a Certificate of Appealability [Dkt. #23] and his Motion for Leave to appeal *in forma pauperis* [Dkt. #24].

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

1 The Petition raises a constitutional question, and Petitioner is correct that the warrantless
2 GPS tracking is no longer permissible. See *United States v. Jones*, 132 S. Ct. 945 (2012). But
3 the Supreme Court case so holding was decided after the events leading to Petitioner's arrest.
4 The officers acted in compliance with Ninth Circuit precedent at the time they acted. See *Davis*
5 *v. United States*, 131 S. Ct. 2419, 2426 (2011) ("[T]he harsh sanction of exclusion should not be
6 applied to deter objectively reasonable law enforcement activity. Evidence obtained during a
7 search conducted in reasonable reliance on binding precedent is not subject to the exclusionary
8 rule").

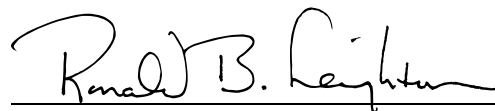
9 Petitioner has not made a substantial showing of the deprivation of a constitutional right
10 in this case. This Court will not issue a Certificate of Appeal, and Petitioner's Motion [Dkt. #23]
11 on this point is DENIED.

12 A court should "deny leave to proceed *in forma pauperis* at the outset if it appears from
13 the face of the proposed complaint that the action is frivolous or without merit." *Tripathi v. First*
14 *Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987) (citations omitted); see also 28 U.S.C.
15 § 1915(e)(2)(B)(i).

16 While Petitioner's claims are not viable, it cannot be said that they are frivolous, or that
17 he is acting in bad faith. Petitioner's Motion [Dkt. #24] on this point is GRANTED. The
18 Petitioner shall be permitted to appeal *in forma pauperis*.

19 IT IS SO ORDERD

20 Dated this 14th day of January, 2013.

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23 Ronald B. Leighton
24 United States District Judge